Constitutional Provisions and Statutes

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT J. LEHNHAUSEN, Director of Department of Local Government Affairs of the State of Illinois,

Petitioner,

No. 71-685 VS.

LAKE SHORE AUTO PARTS CO., et al.,

Respondent.

EDWARD J. BARRETT, County Clerk of Cook County, Illinois, et al.,

Petitioners,

No. 71-691 VS.

CLEMENS K. SHAPIRO, et al.,

Respondents.

On Writs Of Certiorari To The Supreme Court Of Illinois.

BRIEF OF LAKE SHORE AUTO PARTS CO., ET AL., RESPONDENT IN NO. 71-685

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

A. 14th Amendment to the Constitution of the United States:

"Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

B. Illinois Constitution of 1870, Article IX-A:

"Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*

SCHEDULE

"Paragraph 1. This amendment shall become effective January 1, 1971."

C. Revenue Act of 1939 (Ill. Rev. Stat., ch. 120, §4[illegible] et seq.), especially Section 18 thereof (Ill. Rev. Stat., ch. 120, §499):

"The property named in this section shall be assessed and taxed, except so much thereof as may be, in this act, exempted: First: all real and personal property in this state. . . ."

QUESTIONS PRESENTED FOR REVIEW.

The basic constitutional question presented for review is stated somewhat too narrowly at page 2 of the brief of Robert J. Lehnhausen, Director of the Department of Local Government Affairs of the State of Illinois, the Petitioner in *Lake Shore Auto Parts Co., et al.*, v. *Korzen, et al.*, No. 71-685 (hereinafter referred to as "the State", or as "the State of Illinois").

Lake Shore Auto Parts Co., an Illinois corporation, suing in its own behalf and as representative of a class of corporations and other non-individuals similarly situated, Re[illegible]

spondent in No. 71-685 (hereinafter referred to as "Lake Shore"), suggests the following statement as being more appropriate:

> "Whether the equal protection clause of the fourteenth amendment permits a state to discriminate, for ad valorem tax purposes, as between identical property owned by natural persons and that owned by corporations, where in each instance the property is put to the same use and located in the same place."

A second question, necessarily implied in the basic issue, is whether the Illinois Supreme Court erred when, after finding that the equal protection clause *does* prohibit such discrimination, it held that the appropriate solution was to invalidate Article IX-A of the Illinois Constitution of 1870, thereby causing personal property taxes to be reimposed on all taxpayers in the State of Illinois, both natural persons and corporations, and nullifying the referendum at which Article IX-A had been adopted.

A third question necessarily presented is whether the adverse judgment of dismissal on the merits in *Shapiro* v. *Barrett* against M. Weil & Sons, Inc., an Illinois corporation, purportedly acting on behalf of a class of corporations including Lake Shore (said judgment having been affirmed by the Illinois Supreme Court, and no review thereof having been sought in this Court by M. Weil & Sons, Inc. or any other member of its purported class), has *res judicata* effect as to Lake Shore so as to bar Lake Shore from further participation in these consolidated proceedings.

In addition, a number of other issues are sought to be raised in the Petition for Certiorari filed by certain Cook County taxing officials in *Shapiro* v. *Barrett*, No. 71-691, and in the briefs filed by various Respondents in that case.

These issues appear so unsubstantial as not to warrant answer.[1] Furthermore, the parties to *Shapiro* v. *Barrett* do not appear to be seriously pressing those arguments in this Court.[2]

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[1] For example, the argument that Article IX-A should be interpreted so as to be applicable only to personal property "held by natural persons and used for their own personal use and enjoyment", which argument was accepted by the trial judge in *Shapiro* v. *Barrett* (App. 16) is patently frivolous and was decisively rejected by the Illinois Supreme Court (49 Ill. 2d, at p. 146-8). Inasmuch as the Illinois Supreme Court's ruling on this issue constitutes a state court's interpretation of its own constitution and raises no federal constitutional question, that issue is not reviewable here. *American Federation of Labor* v. *Watson*, 327 U.S. 582, 596 (1946).

[2] The Cook County taxing officials, Petitioners in *Shapiro* v. *Barrett* (No. 71-691) have not bothered to file a brief on the merits, and the briefs filed by the nominal Respondents are cursory in nature. The apparent indifference of the parties in that case may well be because they now have their minds set on more important matters. After certiorari was granted by this Court, the trial judge in *Shapiro* v. *Barrett* entered two orders which together have the effect of sequestering all personal property taxes collected in Cook County, other than those paid by corporations. The first of such orders was entered on April 13, 1972, on motion of the taxing officials and without objection of the *Shapiro* plaintiffs. The second order was entered on May 31, 1972, on motion of certain of the *Shapiro* plaintiffs and without objection from the taxing officials. It thus appears that, irrespective of the outcome in this Court, the participants in *Shapiro* v. *Barrett* will have available a substantial fund with which to handsomely compensate themselves for their efforts herein,—notwithstanding that those efforts have contributed nothing to the case.

STATEMENT OF THE CASE.

The Statement of the Case contained in the State's brief is generally accurate and fair. It does, however, contain two errors which should be corrected.

1. At page 4, the State asserts that Lake Shore alleged (in its original complaint) that Article IX-A violated the fourteenth amendment by exempting from ad valorem personal property taxation all personal property owned by "individuals", while authorizing and requiring the continued ad valorem taxation of all personal property owned by entities other than "individuals". This same misstatement of Lake Shore's position appears in the opinion of the Illinois Supreme Court, 49 Ill. 2d, at p. 141.

In actuality, Lake Shore's Complaint contained no such allegation, and was carefully drawn to avoid any such inference. The only allegation of unconstitutionality made by Lake Shore pertained to the taxing statute, and not to Article IX-A. That allegation appears in paragraph 15 of its complaint (Rec. 67) in the following language:

> "The various provisions of the Revenue Act of 1939, insofar as they purport to impose ad valorem taxes with respect to personal property owned by corporations and other 'non-individuals' are invalid, unconstitutional and of no effect whatsoever by reason of the denial of the equal protection of the laws to plaintiff and to the members of the class which plaintiff represents."

2. At pages 2-3 of the State's brief, the following statement appears:

"Article IX of the Illinois Constitution of 1870 granted to the state General Assembly the power to levy a tax by valuation 'so that every person and corporation shall pay a tax in proportion of his, her, or its property' ".

That statement is clearly in error. The General Assembly's power to levy taxes, by valuation or otherwise, was not conferred by the Illinois Constitution, but rather inheres in the sovereignty of the State. *MacMurray College v. Wright*, 38 Ill. 2d 272, 276 (1967). Article IX served only as a limitation on that inherent power, by requiring that any such ad valorem tax on property be levied uniformly, so that every person and corporation should pay a tax in proportion to the value of his, her or its property.[3] Article IX-A, when added by amendment, was intended to both authorize and require a departure from that rule of uniformity by prohibiting any tax on the personal property of "individuals".

Lest there by any misunderstanding, it should be emphasized here that Article IX-A was an amendment to the Illinois Constitution of 1870. That Constitution has since been superseded by the new Illinois Constitution of 1970, which became generally effective on July 1, 1971. The new Constitution does not contain language corresponding to

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[3] Article IX, §9 of the Constitution of 1870 contained a similar uniformity requirement with respect to taxes levied by local governmental units.

Article IX-A. It is nevertheless clear that Article IX, §5(b), thereof was intended to incorporate the requirements of Article IX-A into the new Constitution.(4)

Certain unusual features of this litigation should also be called to the Court's attention at this point. All property taxes collected in Illinois (with the very minor exception of the tax on foreign private car lines) go to local governments and not to the State. Yet the State is the only defendant in *Lake Shore Auto Parts* v. *Korzen* (No. 71-685) which sought certiorari in this Court. The Cook County taxing officials, also defendants in No. 71-685, and who are most intimately concerned with personal property taxation, did not seek review in that case. They did, however, successfully seek certiorari in *Shapiro* v. *Barrett*, No. 71-691, notwithstanding that they had achieved complete victory in that case in the Illinois Supreme Court.

The only pleading filed by these Cook County officers in *Shapiro* v. *Barrett* was a motion to dismiss the complaint on the grounds that it did not set out a cause of action. (Rec. 291). The trial judge granted that motion as to three of the plaintiffs (all except Shapiro) and ordered the complaint dismissed as to them (App. 17). As to the fourth plaintiff (Shapiro) the trial judge denied the motion to

(4) Section 5(b) of Article IX of the 1970 Constitution reads as follows: "Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated." The peculiarly obscure language of Section 5(b) [and also of Section 5(c)] is apparently attributable to the compromise of various political considerations which confronted the delegates to the Constitutional Convention. See Kamin, Constitutional Abolition of Ad Valorem Personal Property Taxes: A Looking-Glass Book, 60 Ill. Bar Jrnl. 432, 434 (1972). The language of Section 5(b) was settled on by the Constitutional Convention prior to the date of the referendum on Article IX-A, but in anticipation that Article IX-A would be approved by the electorate.

dismiss. On appeal, the Illinois Supreme Court sustained the trial court's dismissal of the complaint as to the three plaintiffs (though for a different reason), and reversed the order denying the motion to dismiss as to Shapiro, remanding with directions to dismiss the *Shapiro* complaint in its entirety (49 Ill. 2d, at p. 151).

None of the plaintiffs in *Shapiro* v. *Barrett* sought review of the order of the Illinois Supreme Court dismissing their complaint. Hence, they appear in this Court as Respondents.

To complicate the situation still further, the so-called *Maynard* plaintiffs, who filed an original action in the State Supreme Court on the representation that their participation was essential to a full determination of the issues, were the only parties to this litigation who asserted the unconstitutionality of Article IX-A itself (albeit as a secondary argument) and this position was ultimately adopted by the Illinois Supreme Court. Nevertheless, that Court ordered that the *Maynard* complaint be dismissed (49 Ill. 2d, at p. 152), apparently because the Court felt that it had acted improvidently in agreeing to accept original jurisdiction thereof (49 Ill. 2d at p. 145). Thinking themselves to be winners, the *Maynard* plaintiffs made no attempt to seek review of that order of dismissal. Inasmuch as they were not parties to either of the other two consolidated proceedings, they now find themselves excluded from participation in this litigation,—except, perhaps, in the status of *amicus curiae*.

SUMMARY OF THE ARGUMENT.

Prior to 1971 the Constitution of Illinois (Const. of 1870, Art. IX, §1) required that any tax which might be imposed on property, both real and personal, be assessed uniformly, so that every person and corporation would pay a tax in proportion to the value of his, her or its property. Accordingly, the Revenue Act of Illinois has long authorized taxes on "all real and personal property in this state."

By an amendment to that Constitution (Article IX-A), proposed by the legislature and approved overwhelmingly by the People at a referendum in November of 1970, the taxation of personal property by valuation was prohibited "as to individuals".

As a necessary consequence of the adoption of that constitutional amendment, the Revenue Act thereafter purportedly imposed ad valorem taxes only on personal property not owned by "individuals". While the meaning of "individuals" is nebulous, it is agreed that the term does not encompass corporations.

The personal property tax is a property tax by any definition, and is not a franchise, privilege or occupation tax. For almost ninety years the courts of this country have consistently held that the equal protection clause of the fourteenth amendment prohibits discrimination, for property tax purposes, based solely upon the corporate characteristics of the property owner. That doctrine was recognized by this Court as early as 1895 in *McHenry* v. *Alford*, 168 U.S. 651, 666, and expressly adopted in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928).

The discriminatory taxing pattern established in Illinois as a consequence of the interaction between Article IX-A and the Revenue Act is in no sense related to the nature or use of the property subjected to tax, or to its location. Nor can the discrimination be rationalized as serving some legitimate legislative purpose. The Official Explanation of the Amendment, and the Official Argument in Favor of its Adoption, both of which were prepared by the state legislature and circulated to every elector in the state, are all-inclusive, and suggest no valid reason whatsoever for the distinction as between corporate-owned and individually-owned property.

Accordingly, the Illinois Supreme Court properly held that the discrimination was prohibited by the equal protection clause. That Court, however, erred in striking down Article IX-A itself, rather than the Revenue Act,—thus causing personal property taxes to be reimposed upon all taxpayers, both corporate and individual. Article IX-A imposes no tax, and is inoffensive to the fourteenth amendment. Only the taxing statute itself, as necessarily modified by Article IX-A, imposes an invalid tax. That statute, and not the constitutional amendment, should have been striken down.

Finally, the adverse judgment rendered below against M. Weil & Sons, Inc. (one of the plaintiffs in the consolidated case of *Shapiro* v. *Barrett*, No. 71-691), although purportedly rendered against a class which included Lake Shore Auto Parts Co. (the plaintiff in No. 71-685), is not *res judicata* as to Lake Shore Auto Parts Co. because of the total want of due process of law in the entry of the class action order in *Shapiro* v. *Barrett*.

ARGUMENT.

I.

A CLASSIFICATION WHICH DISTINGUISHES AS BETWEEN CORPORATIONS AND NATURAL PERSONS FOR THE PURPOSE OF IMPOSING AN AD VALOREM PROPERTY TAX IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Preliminary Statement.

Where the application of the equal protection clause to state taxing statutes is in issue, certain general propositions of law have been stated so often by this Court that they are not open to dispute:

1. "The fourteenth amendment is not intended to compel the states to adopt an iron rule of equal taxation." (*Bell's Gap R. Co.* v. *Pennsylvania,* 134 U.S. 232, 237 (1890)). "A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." (*Brown-Forman Co.* v. *Kentucky,* 217 U.S. 563, 573 (1910)).

2. "But the classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circum-

stanced shall be treated alike." (*F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)). "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." (*Morey* v. *Doud*, 354 U.S. 457, 464 (1957)).

3. "The nature of a tax must be determined by its operation rather than by particular descriptive language which may have been applied to it." (*Educational Films Corp. of America* v. *Ward*, 282 U.S. 379, 387 (1931)).

The repetition of these generalities, unfortunately, is of little assistance in determining whether or not the particular form of discriminatory taxation established subsequent to the adoption of Article IX-A is a permissible one. Proper resolution of that issue, in Lake Shore's view, requires a detailed examination of the decided cases and their underlying rationale.

Several other propositions of law, somewhat narrower in scope than those mentioned above, appear to be equally well established:

4. Corporations are "persons" within the meaning of the fourteenth amendment. *Pembia Consol. Silver Mining Co.* v. *Pennsylvania*, 125 U.S. 181, 188 (1888); *Southern Railway Co.* v. *Greene*, 216 U.S. 400, 417 (1910).

5. The privilege of doing business in corporate form within the territorial jurisdiction of a state is a matter of legislative grace, and not one of constitutional right. A state legislature, no doubt, could prohibit all corporate activity within its borders. *Paul* v. *Virginia*, 8 Wall. 168 (1869). Having the power to ex-

clude absolutely, the legislature unquestionably has the right to impose conditions upon the exercise of the privilege, including the payment of taxes. This is particularly true in view of the unique advantages which inhere in the corporate form of organization. *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911); *Thorpe* v. *Mahin*, 43 Ill. 2d 36 (1969).

6. Nevertheless, a state may not require a corporation to waive and forego rights guaranteed by the federal constitution as a condition for the exercise of its charter privileges. Once the corporation has paid the requested price for its charter (or for its admission to the state in the case of a foreign corporation), then that corporation becomes entitled to the full benefits of the protection afforded by the constitution. *Hanover Insurance Co.* v. *Harding*, 272 U.S. 494, 507 (1926); *Wheeling Steel Corporation* v. *Glander*, 337 U.S. 562, 571 (1949).

7. Yet, the proposition stated in paragraph 6 clearly does not preclude the state from thereafter increasing its franchise tax on corporations, or from imposing new and additional taxes on the privilege of doing business in corporate form. That is merely to say, however, that by granting a charter or certificate of admission the state does not contract away its sovereign power of taxation. *Home Insurance Company* v. *New York*, 134 U.S. 594 (1890).

In the light of the foregoing, the basic issue in this case may well be viewed simply as a matter of determining whether the discriminatory taxation of corporations vis-a-vis natural persons can properly be considered a tax on the privilege of doing business in corporate form, as contended

by the State (Pet's. Brief in No. 71-685, at page 15), or whether, as Lake Shore believes, it was neither intended nor serves as such a privilege tax but is instead imposed on corporations alone for the sole and simple reason that corporations, unlike individuals, are not entitled to vote.

From the perspective of an elected public official, no doubt, a classification designed to curry favor with the electorate may well appear as a rational one; but that is hardly the sort of rationality which is required of legislative classifications by the equal protection mandate. If the position advanced by the State of Illinois is sustained by this Court it would be tantamount to a holding that corporations are no longer to be deemed "persons" entitled to the protection of the fourteenth amendment. Furthermore, it would come very close to a holding that the fourteenth amendment has no application to property rights. Such a reversal of long-standing judicial policy ought not to be undertaken lightly,—particularly when this Court, in the very recent case of *Lynch* v. *Household Finance Corporation*, ... U.S. ....., 92 S. Ct. 1113, 1122 (1972), observed that personal liberties and property rights are indistinguishable.

B. The Position Urged by the State of Illinois Would Produce Serious and Undesirable Consequences.

Lest the import of this case be underestimated, it is well to consider some of the practical consequences which will necessarily follow if this Court should see fit to adopt the position urged upon it by the State of Illinois:

1. Assume that two competing businesses are located in the same community. Each produces or sells the same

goods and they both own identical assets. One business is operated in corporate form, and the other as a sole proprietorship. Only the corporate business will be required to pay an ad valorem personal property tax on its inventories, fixtures, work-in-progress and raw materials. The sole proprietorship is exempt from this heavy burden, even though its property and business are identical to those of the corporation.

2. Since there clearly is no basis for distinguishing an ad valorem personal property tax from an ad valorem tax on real estate, a state legislature will be empowered to establish the same form of discrimination as between identical parcels of real estate, depending on whether they are owned by corporations or by individuals,—and quite without regard to the use to which such real estate is put. Taking into consideration the realities of political life, it is certain that this power will be widely exercised once the constitutional restraint is removed.

3. The pattern of discrimination thus authorized will bear no relationship whatsoever to wealth, to ability to pay, to benefits received, or to any other established criterion of tax equity. The individual who owns the hypothetical business or parcel of real estate may be a person of enormous wealth and huge income who owns many other businesses or much real estate. The corporate owner, on the other hand, may have no other assets at all, and, indeed, that corporation's capital stock may comprise the sole asset of its stockholders.

Lake Shore respectfully submits that it is all but impossible to find a rational basis for a classification which produces these results,—unless one is willing to assume

that it reflects a legislative policy designed to discourage the ownership of personal property by corporations. Yet, the State of Illinois, in its brief, does not remotely suggest that this is the case. Nor is any such policy even hinted at in the Explanation of Article IX-A or in the Argument in Favor thereof, both of which documents were prepared by the General Assembly and circulated to all voters in the state prior to the November, 1970, referendum (Rec. 160). These official documents together constitute the clearest possible exposition of the legislative intent underlying Article IX-A, and presumably, also of the electorate's intent in adopting that Article at referendum. The texts of these documents are included herein as Appendix A to this brief. If the General Assembly of Illinois did in fact desire to discourage the ownership of personal property by corporations it surely would have advised the electorate to that effect, and set forth the reasons which made such action appear appropriate.

C. Long-Established Interpretations of the Fourteenth Amendment Prohibit a Property Tax Which Discriminates Against Corporate Ownership.

For nearly ninety years it has been settled doctrine that an ad valorem property tax may not be imposed which discriminates against property owners solely by reason of the fact that they are corporations. Such a classification is *per se* unreasonable, and constitutes a deprivation of the equal protection of the laws guaranteed by the fourteenth amendment to the United States Constitution.

Judge Cooley stated the rule in even broader form:

"Classification for exemption purposes may be based on the use to which property is devoted, as well as the nature of the property; but property cannot be exempted merely because of its ownership where the same kind of property owned by others is taxed . . . Instead of classifying property for the purpose of exemption either by its characteristics or by its uses, the legislature cannot classify the owners of property according to some characteristic possessed by them, or connected with their conduct, and thereupon base an exemption of the property of such persons, regardless of the characteristics possessed by it and of the uses to which it is put." 1 Cooley on Taxation (4th ed., 1924) ¶280, p. 594.

Another respected authority has stated "that there would very probably be no dissent" from the proposition that the United States Supreme Court is prepared to guarantee to all corporations equality with individuals in respect to all property taxation. Sholley, Corporate Taxpayers and the Equal Protection Clause, 31 Ill. L.R. 463, 589 (1937).

The doctrine, insofar as it is relevant to the case at bar, had its origin in two decisions of the 9th Federal Circuit Court in the *California Railroad Tax* cases: *San Mateo County* v. *Southern Pacific R. Co.*, 13 Fed. 722 (1882), app. dism. per stip., 116 U.S. 138 (1885); and *Santa Clara County* v. *Southern Pacific R. Co.*, 18 Fed. 385 (1883), aff'd. on other grnds, 118 U.S. 394 (1886). See also *San Bernardino County* v. *Southern Pacific R. Co.*, 118 U.S. 417 (1886).

The history and background of these famous cases has been detailed elsewhere.[5] The litigation arose out of the 13th Article of the California Constitution of 1879, which provided that, *except as to railroads and other quasi-public corporations,* the value of any outstanding mortgage or other encumbrance was to be deducted from the assessed value of the property subject thereto. The defendant railroads challenged their assessments on various grounds, among them being a claim that this provision denied to them the equal protection of the laws. That issue was presented to the court, along with the even more fundamental question of whether a corporation was a "person" within the equal protection clause of the then recently enacted fourteenth amendment.

The chief opinion in each of the cases was written by Justice Field, an Associate Justice of the United States Supreme Court assigned to the circuit. In each case, also, there is a concurring opinion by Justice Sawyer.

The court, after extensive consideration of the issues, held that corporations are "persons", and that the operation of the constitutional provision in question *did* deprive them of the equal protection of the laws. The relief ordered was a reduction of the assessment by the amount of the outstanding indebtedness, so as to place the railroads on a parity with natural persons. (18 Fed. at p. 414).

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[5] See, e.g., Sholley, op. cit., 31 Ill. L.R. 463 and 567, at 469-474 (1937); McLaughlin, The Court, The Corporation and Mr. Conkling, 46 Am. Hist. Rev. 45, 52 (1940); and see the dissenting opinion of Justice Douglas, and the concurring opinion of Justice Jackson in *Wheeling Steel Corp.* v. *Glander,* 337 U.S. 562, 576, 574 (1949).

Justice Field first undertook to meet the argument that the California Constitution did nothing more than impose a "reasonable classification", stating (13 Fed. at p. 737-8):

> "It is not classifying property to provide that the property of certain parties . . . shall be assessed at its value after deducting the mortgage; and that the property of other parties . . . shall be taxed at its full value without any deduction. That is not providing for a different rate of taxation for *different kinds of property, but for unequal taxation according to the character of the owner.*" (emphasis added)

In his subsequent opinion in the *Santa Clara* case, (18 Fed. at p. 408), Justice Field restated the basis for rejecting the "reasonable classification" contention:

> "The discrimination between the railroad companies and individual proprietors, in the estimate of the value of their property, is made because of its ownership, and not from any specific differences in the character of the property, or in the specific uses to which it is applied."

Justice Sawyer, in his concurring opinion, was equally incisive on this question (18 Fed. at p. 432):

> "Classification should have reference to the different character, situation, and circumstances of the property, making a different form or mode of taxation proper, if not absolutely necessary. It cannot be arbitrarily made with mere reference to the nationality, color, or character of the owners, whether natural or artificial persons, without any reference to a difference in the character, situation, or circumstances of the property."

The taxing bodies then argued that, even if the assessment could not be sustained as a property tax, it ought

to be sustained as a franchise tax,—i.e., a "condition of the continued existence of the railroad corporation" (13 Fed. at p. 754).

The court recognized, of course, that the State of California had the right to exclude the corporation entirely from the doing of business within its borders, and therefore the right to impose such conditions as it chose as a condition for admission or for continued permission to do business. Nevertheless, Justice Field presented two answers to this argument:

1) The California constitutional provision in question, and the statute thereunder, *were not intended as a franchise tax* or a condition for the continuation of the franchise;

2) The right of the state to exclude the corporation altogether does not mean that the state may, as a condition for continued permission to do business, require the corporation to waive and forego the rights otherwise guaranteed to it by the United States Constitution; "What the state may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution."(*)

Appeals to the United States Supreme Court were filed in both cases. *San Mateo* was settled by the parties and the appeal withdrawn (116 U.S. 138). In the *Santa Clara County* case, this Court did pronounce that corpo-

(*) This "second answer" of Justice Field has been fully accepted by the United States Supreme Court, though its most common application has been in situations where the discrimination is against foreign corporations vis-a-vis domestic corporations. See *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 571 (1949), and cases cited therein.

rations are "persons" under the fourteenth amendment, thus giving to the case a measure of immortality. The Court, however, avoided a decision on the specific question of whether the California constitutional provision denied equal protection to the railroad, and the Circuit Court decision was instead affirmed on a narrow technical ground (118 U.S. 394). In a concurring opinion in the companion case of *San Bernardino County* v. *Southern Pacific R. Co.*, 118 U.S. 417, 423 (1886), Justice Field expressed strong regret that the Court had not seen fit to decide the important constitutional question, stating:

> "The question is not whether the state may not claim for grants of privileges and franchises a fixed sum per year, or a percentage of earnings of a corporation,—that is not controverted,—but whether it may prescribe rules for the valuation of property for taxation which will vary according as it is held by individuals or by corporations. The question is of transcendent importance, and it will come here, and continue to come, until it is authoritatively decided in harmony with the great constitutional amendment which insures to every person, whatever his position or association, the equal protection of the laws; and that necessarily implies freedom from the imposition of unequal burdens under the same conditions."

Yet, despite the absence of a definitive Supreme Court holding, the Circuit Court opinions in the *California Railroad Tax* cases were accepted quickly by both the federal and state courts as a correct interpretation of the equal protection clause: *Walker* v. *Northern Pacific Ry.*, 47 Fed. 681, 686 (C.C.N.D., 1891); *Russell* v. *Croy*, 63 S.W. 849, 853-7 (Mo., 1901); *Northern Pacific Ry. Co.* v. *Sanders County*, 214 Pac. 596, 599 (Mont. 1923); *State ex rel Northern Pacific Ry. Co.* v. *Duncan*, 219 Pac. 638, 640

Mont. 1923); *Gamble-Robinson Fruit Co.* v. *Thoreson*, 204 N.W. 861, 864-5 (N.D. 1925); *Northwestern Improvement Co.* v. *State*, 220 N.W. 436, 439-40 (N.D. 1928).

The language of the North Dakota Supreme Court in the *Gamble-Robinson* case, *supra*, is typical:

> "It is a settled rule of law, as applicable to tax matters as to other concerns of government, that legislative classification, to be legitimate, must have regard to differences in character or use of property, character of the business affected or of governmental relationship, and cannot be purely arbitrary . . . Or, to use the language of Justice Brewer, in the case of *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U.S. 150, 17 S. Ct. 255, 41 L. Ed. 666, the classification must be 'one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' It requires no argument to prove that the character of the ownership—that is, as to whether a given species of property is owned by a corporation, joint-stock company, or association, or owned by an individual—affords no reasonable basis for classification. . . . If, therefore, the legislation is subject to the constitutional limitation of equal protection, it cannot be sustained."

As early as 1898, this Court by way of dictum in *McHenry* v. *Alford*, 168 U.S. 651, 666, indicated approval of the position taken by Justice Field in *The California Railroad Tax* cases:

> ". . . we agree that property of the same kind, and under the same condition, and used for the same purpose, cannot be divided into different classes for purposes of taxation, and taxed by a different rule, simply because it belongs to different owners. . . ."

In *Quaker City Cab Co.* v. *Commonwealth of Pennsylvania*, 277 U.S. 389 (1928) this Court, relying on *The California Railroad Tax* cases, held unconstitutional, as a violation of the equal protection clause, a statute of Pennsylvania which imposed a tax on the gross receipts of incorporated taxicab companies (both domestic and foreign) while wholly exempting the receipts of unincorporated taxicab businesses.

A tax on business receipts is not ordinarily thought of as a property tax, and the Court did not specifically so characterize it, although such might be inferred from the statement (at p. 401) that "a characterization of the tax by the state court is not binding here".(7)

As the basis for its holding, this Court stated (p. 402):

> "Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations, as are taxes on their capital stock or franchises. . . . The character of the owner is the sole fact on which the distinction and discrimination are made to depend. *The tax is imposed merely because the owner is a corporation.* . . . It follows that the section fails to meet the requirement that a classification, to be consistent with the equal protection clause, must be based on a real and substantial difference having a reasonable relation to the subject of the legislation." (emphasis added)

Three separate dissents were filed by Justices Holmes, Brandeis and Stone, and the thrust of each of them is the same,—that the tax was in reality an excise on the

(7) Then Pennsylvania Supreme Court had sustained the discrimination at least partly on the ground that the tax was not a tax on property. 287 Pa. 161, 169 (1926).

privilege of operating a taxicab business in corporate form. Therefore, it should have been sustained on the authority of cases such as *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911). In other words, the dissenting justices took sharp issue with the majority's view that "the tax is imposed merely because the owner is a corporation". As they saw it, "ownership", as such, had nothing at all to do with the particular tax in question. (In the case now at bar, of course, "ownership" has everything to do with the tax in question).

The "character of the owner" has no bearing whatsoever in the case of a true excise tax. By definition, ownership is irrelevant. The tax is imposed upon the *exercise* of some act or privilege. Sometimes, admittedly, the line of demarcation is not easy to discern,—though that is hardly a problem in this case. In *Bromley* v. *McCaughn*, 280 U.S. 124, 137 (1929), this Court recognized that an excise or privilege tax may be imposed "upon the exercise of one of the numerous rights of property, *but each is clearly distinguishable from a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his property*" (emphasis added).

There is every reason to believe that each of the dissenting justices in *Quaker City Cab* would have joined the majority in condemning a true property tax which discriminated against corporations solely on the basis of ownership. This is evident not only from the language of the dissenting opinions themselves, but also from other contemporaneous opinions of the dissenters.[8]

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[8] See, for example, Brandeis' dissenting opinion (joined by Holmes and Stone) in *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32, 53 (1927), where he argues that the Kentucky mort-

In any event, and whether or not this Court was correct in its characterization of the particular tax there in issue, there can be no doubt that the *Quaker City Cab* case stands at least for the proposition that the equal protection clause prohibits discriminatory taxation against corporations based solely on the ownership of property. The net result of the case is to elevate to Supreme Court status the earlier holdings in the *California Railroad Tax* cases, and thereby vindicate the judgment of Justice Field.

Quaker City Cab has been followed on innumerable occasions. For example, in *Garysburg Mfg. Co.* v. *Pender County*, 42 F. 2d 500, 506 (E.D.N.C., 1930), rev'd. on other grnds., 50 F. 2d 732 (4th Cir., 1931), a federal district court invalidated a North Carolina statute which required that shares of stock in foreign corporations should be assessable on an ad valorem basis as personal property when owned by corporations, but not when owned by individuals.

After first characterizing the tax as a property tax, and not an excise tax, the court, in a thoughtful opinion, noted that there was "no logical recognized or necessary reason for the distinction", and that "such legislative

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gage recording act should have been sustained notwithstanding the exemption of short term mortgages, because "*the characteristics of this deed of trust* clearly furnish a basis for reasonable classification as compared with probably every mortgage exempted from the recording tax. If the statute as applied does not in fact discriminate in favor of *any property of a like nature*, there is not inequality in treatment." (emphasis added). Compare also Cardozo's dissenting opinion, joined by Brandeis and Stone, in *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 550 (1934), where the debate centered only around the question of whether the majority had correctly characterized the tax there in issue as a "property tax".

action cannot have any other purpose or justification than evident intent to discriminate against the corporation" in violation of the fourteenth amendment.

The holding in *Garysburg Mfg. Co.* v. *Pender County* is clearly irreconcilable with the earlier case of *Fort Smith Lumber Co.* v. *Arkansas*, 251 U.S. 532 (1920), wherein this Court, in a very brief opinion, had sustained an Arkansas statute which was virtually identical to the North Carolina law stricken down in *Garysburg*. The judge in the latter case believed that *Fort Smith* had been effectively overruled by *Quaker City Cab.* This belief is apparently shared by Professor Sholley,(*) and would seem to have been confirmed by the subsequent course of history,—*Fort Smith Lumber Co.* v. *Arkansas* has almost never been cited as authority in later cases and has fallen into virtual obscurity. *Quaker City Cab*, on the other hand, quickly became a landmark decision in the interpretation of the equal protection clause. See, for example, *Concordia Fire Ins. Co.* v. *Illinois*, 292 U.S. 535, 549 (1934); *Redfield* v. *Fisher*, 292 Pac. 813 (Ore. 1930), reh. den. sub nom. *Redfield* v. *Norblad*, 295 Pac. 461 (1931), cert. den. 284 U.S. 617 (1931); *Aberdeen S. & L. Ass'n* v. *Chase*, 289 Pac. 536, 541 (Wash., 1930), op. on reh., sub nom. *Washington Mutual Savings Bank* v. *Chase*, 290 Pac. 697 (1930); *Mount Hope Cemetery Co.* v. *Pleasant*, 32 Pac. 2d 500, 503 (Kan. 1934); *State* v. *Hunt*, 9 N.E. 2d 676, 681-2 (Ohio, 1937); *H. Rouw Co.* v. *Texas Citrus Comm'n.*, 247 S.W. 2d 231, 234 (Tex. 1953).

In the cases thus far considered, the discrimination held unconstitutional was directed against corporations as

(*) Sholley, Corporate Taxpayers And The Equal Protection Clause, 31 Ill. L.R. 463 and 567, 588 (1937).

such, and in favor of natural persons. Also very much relevant to the problem at hand is a long and well-established line of cases in this Court which have laid down the rule that a property tax may not, under the equal protection clause, serve as the basis for discriminating against foreign corporations and in favor of domestic corporations.

The origin of this rule can be traced to *Southern Railway Co.* v. *Greene,* 216 U.S. 400 (1910), and its most recent application was in *WHYY, Inc.* v. *Borough of Glassboro,* 393 U.S. 117, 119 (1968). The leading case is *Wheeling Steel Corp.* v. *Glander,* 337 U.S. 562 (1949), wherein this Court held invalid, on equal protection grounds, an Ohio statute which required that certain categories of intangible personal property be subject to ad valorem taxation only if owned by non-residents or foreign corporations. The holding of the Court is summarized in the following language (337 U.S. at 571-2):

> "After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own progeny, at least to the extent that their property is entitled to an equally favorable ad valorem tax basis. . . . Ohio holds this tax to be an ad valorem property tax . . . and in no sense a franchise, privilege, occupation or income tax."

The position of the State of Illinois in the instant case, apparently, is that *Glander* (to say nothing of *Quaker City Cab*) has been effectively overruled by *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1959). If *Allied Stores* was the final word on the subject this contention might have a semblance of plausibility,—for *Allied Stores* (discussed infra at p. 40) is arguably a troublesome

decision. The argument advanced by the State of Illinois (at p. 16 of its Brief) is, however, clearly refuted by *Reserve Life Insurance Co.* v. *Bowers,* 380 U.S. 25 (1965), wherein this Court on the authority of *Wheeling Steel Corp.* v. *Glander,* summarily reversed an Ohio State Court decision [196 N.E. 2d 114 (Ohio App., 1963)] which had upheld a statute exempting domestic corporations from an ad valorem personal property tax imposed on foreign corporations. The significance of this case lies in this Court's summary rejection of the argument advanced by the Ohio Tax Commissioner that *Glander* had been effectively overruled by the *Allied Stores* decision,[10]—the same argument which the State of Illinois advances here.

D. The Traditional Distinction as Between Property Taxes and Nonproperty Taxes Reflects a Genuine and Important Difference.

The authorities considered in the immediately preceding section of this brief were all concerned directly with the operation of the equal protection clause upon state taxing statutes. It is clear from these authorities that characterization of the tax in question, either as a "prop-

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[10] See brief of Appellee in *Reserve Life Insurance Co.* v. *Bowers,* U.S. Sup. Ct., October term, 1964, Docket No. 96, at p. 8. Professor Jerome Hellerstein has observed that the Ohio State Court's decision, if it had been allowed to stand, would have made it "virtually impossible for any taxpayer to demonstrate that the requisite lack of uniformity or unreasonableness of classification exists." Hellerstein, State and Local Taxation, Cases and Materials (West Pub. Co., 3rd ed., 1969).

erty tax" or as a "nonproperty tax",[11] has been a crucial factor in determining the permissible scope of classification.

The tax involved in this case,—an ad valorem tax on personal property,—is a true property tax by any definition, and the State does not otherwise contend. Implicit in the State's brief, however(and explicit in the *amicus curiae* brief of the Honorable Richard B. Ogilvie, Governor of Illinois), is the contention that the long-standing distinction between property taxes, on the one hand, and nonproperty taxes on the other, is an artificial, outmoded and generally meaningless one which ought to be dispatched to an overdue grave.

Lake Shore suggests, however, that the traditional dichotomy represents a substantial and genuine distinction that is firmly grounded in the history of taxation, in economic theory, in contemporary constitutional language, both state and federal, and, above all, in the judicial decisions of the courts of this country. Indeed, most of the classic opinions rendered by this Court in the field of taxation have turned upon the characterization issue. Whether each of those cases was correctly decided is beside the point. To adopt the State's argument here

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[11] The actual use of the term "nonproperty tax" is relatively rare, both in judicial opinions and in constitutional or statutory language, although it does now appear in Art. IX, §2, of the new Illinois Constitution of 1970. Much more commonly used are the equivalent phrases "excise tax" or "franchise, privilege and occupation tax". Inasmuch as the real issue in the cases is simply one of whether or not the tax is a "property tax", the use of the more generalized term "nonproperty tax" seems preferable, and avoids the sometimes awkward problem of fitting a new form of tax into the traditional definition of an "excise" or a tax on "franchises, privileges or occupations".

would be equivalent to conceding that much has been said about absolutely nothing. More important, it would eradicate an established criterion for distinguishing a valid tax from an invalid tax,—without substituting anything in its place other than vague generalities. If the discriminatory tax created by Article IX-A is permitted to stand, then the equal protection clause will have been emasculated as a means of protecting corporate taxpayers against arbitrary state action in the matter of taxation.

While various definitions can be found for the terms "property" tax and "nonproperty" (or "excise") tax, the most useful is probably that offered by Professor Sholley in a frequently cited article published in 1937.[12] "The primary question," he says, "is whether the tax is payable *because* the taxpayer is an incorporated group enjoying the special privileges which attend the transaction of business in that form, or *because* the taxpaying corporation owns property . . .". (emphasis in original) The Supreme Court of Illinois has embraced a similar definition:

> "Taxes are generally defined as coming within two classes, property taxes and excise taxes . . . and excise taxes are variously denominated, such as occupational, licenses, privilege, franchise, and other types which are distinguished from property taxes by one being a tax directly upon the property itself, and the other as a charge for a privilege arising from the use of the property itself, generally intangible in nature." *Village of Lombard* v. *Illinois Bell Telephone Company,* 405 Ill. 209, 213 (1950).

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[12] Sholley, Corporate Taxpayers and the Equal Protection Clause, 31 Ill. L.R. 463 and 567 (1937), at p. 581.

The difference between the two forms of taxation is readily apparent from their definitions. The significance to be attached to that difference is, of course, a more subtle problem.

Quite apart from its role in fourteenth amendment cases the dichotomy between property and nonproperty taxes has played an enormously important role in the history of American taxation.

The distinction is reflected in almost all of the state constitutions. These commonly require a high degree of uniformity with respect to property taxes, while at the same time authorizing liberal classification with respect to nonproperty taxes. Accordingly, almost every new form of taxation devised by a state legislature has been immediately confronted with a challenge requiring that it be characterized as a nonproperty tax if it is to survive. The great bulk of state court litigation, of course, has centered on the income tax,—and particularly the tax on corporate net income. A detailed analysis of these cases can be found in Newhouse, Constitutional Uniformity and Equality in State Taxation (Ann Arbor, 1959), at page 690, et seq., and need not be repeated here. See also, Annotation, What is a Property Tax as Distinguished from Excise, License and Other Taxes? 103 A.L.R. 18 (1936).

An analagous problem with respect to federal taxes is presented in the United States Constitution. Article I, § 2, Cl. 3, requires that "direct" taxes be apportioned among the several states according to population. On the other hand, Article I, § 8, Cl. 1, specifies that "duties, imposts and excises" need only be uniform throughout

the United States, thus permitting "reasonable" classification. (See *Knowlton* v. *Moore*, 178 U.S. 41, 84 (1900)).

Inasmuch as the term "direct tax" encompasses only taxes on property and the now obsolete capitation or poll tax (*Hylton* v. *United States*, 3 Dall. 171 (1796)) this Court has on many occasions been called upon to determine whether a non-apportioned tax imposed by Congress is or is not a property tax,—essentially the same characterization problem as is presented by the equal protection decisions with respect to state taxes.

In a number of early cases such as *Hylton* v. *United States*, 3 Dall. 171 (1796); *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433 (1869); *Veazie Bank* v. *Fenno*, 8 Wall. 533 (1869); and *Scholey* v. *Rew*, 23 Wall. 331 (1875), the Court embraced a narrow view of what constitutes a direct tax, and hence a broad view of the powers of Congress in the area of taxation. On the other hand, in *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895), op. on reh. 158 U.S. 601 (1895), the Court determined that the federal income tax imposed by the Act of 1894 was a tax on property, and hence a direct tax invalid for lack of apportionment. Subsequently, in *Knowlton* v. *Moore*, 178 U.S. 41 (1900), and *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911), the Court held, respectively, that a federal tax on inheritances and a federal tax on corporate income were not direct taxes.

For purposes of the case now at bar, the most important of the "direct tax" cases, unquestionably, is *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911), especially since this Court took special pains to analogize the issue before it to one involving the validity of a state tax under the fourteenth amendment (220 U.S., at pp. 158, 161).

In *Flint* v. *Stone Tracy* this Court upheld the validity of a federal tax levied exclusively on the income of corporations, and for that reason the State of Illinois, at p. 17 of its brief, purports to place great reliance upon it. The real significance of the case, however, lies in the fact that the Court was able to reach that result only after first characterizing the tax as an excise tax, and *not* a property tax. That characterization issue is the key to the case, and it is the subject of a lengthy and enlightened discussion at pages 147-152 of the opinion. Thus, *Flint* v. *Stone Tracy* strongly supports Lake Shore's position, and not that of the State,—for an ad valorem tax on personal property very clearly *is* a property tax, and not an excise.[13] (The State reluctantly, and somewhat deviously, concedes as much in footnote 5 at page 18 of its brief.)

As was made clear by this Court in *Flint* v. *Stone Tracy*, the proper characterization of a state tax is frequently crucial to a determination of its validity under the equal protection clause. This is further illustrated by a great many cases, such as *Hanover Fire Ins. Co.* v. *Harding*, 272 U.S. 494 (1926); *Concordia Fire Ins. Co.* v. *Illinois*, 292 U.S. 535 (1934); *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928); and *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283 (1898).

The last mentioned case was one of those referred to by this Court in *Flint* v. *Stone Tracy*, and is considered a

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[13] Similarly, in *Thorpe* v. *Mahin*, 43 Ill. 2d 36, 42 (1969), the Illinois Supreme Court upheld a differential tax on corporate income only after a preliminary finding that the tax was not a property tax,—thereby overruling a prior holding to the contrary in *Backrach* v. *Nelson*, 349 Ill. 579 (1932).

leading case in the fields of both constitutional law and taxation. In *Magoun*, this Court upheld the Illinois Inheritance Tax Law as against a claim that its exemption and graduation features constituted a denial of equal protection. The Court commenced its analysis of the problem by observing (at p. 288) that prior decisions had established that a tax on inheritance is *not* a property tax, but rather a tax on the "privilege" of acquiring property through inheritance.

The importance of this characterization is evident from the Court's repeated references to it throughout the opinion. For example, at p. 298: "The reasoning of appellant (taxpayer) is based on the view that the tax is one on property, instead of one on the succession as seen by the supreme court of the state." And the dissenting justice says (at p. 302): "It seems to be conceded that if this were a tax on property, (it) could not be sustained."

The reason the tax could not be sustained as a property tax, of course, is that then the classification (the varying tax rates and the differential exemptions) would necessarily depend on the character of the owner of the "property" (i.e., the estate inherited by the taxpayer). That is to say, if the owner (the devisee or legatee) were a stranger to the decedent he would be compelled to pay a larger tax on a given value of "property" (inheritance) than would a close blood relative of the decedent. That is precisely the sort of classification which the equal protection clause does not permit in the case of a property tax. Yet that is precisely the sort of classification which Article IX-A superimposes on the personal property tax provisions of the Revenue Act of Illinois.

Many of the other cases upon which the State relies in its brief are likewise dependent entirely upon the Court's characterization of the tax in question as a nonproperty tax, and hence they have no application here. Among these is the important case of *Home Insurance Co.* v. *New York*, 134 U.S. 594 (1890). In its subsequent decision in *Pacific Co., Ltd.* v. *Johnson*, 285 U.S. 480, 489 (1932), this Court explained the true rationale of *Home Insurance*, emphasizing the importance of the "franchise tax" characterization. Other cases cited by the State and falling into this category are: *Lawrence* v. *State Tax Commission*, 286 U.S. 276 (1932); *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342 (1916); and *State Board of Tax Commissioners* v. *Jackson*, 283 U.S. 527 (1931).

The Governor of Illinois and its Attorney General are not, of course, the first to have argued that the validity of a tax ought not be made dependent upon a mere matter of words. However, at least one prominent commentator (who to some extent shares that view) has frankly acknowledged that this sort of criticism is essentially self-serving,—that the real concern of those who advance it is a fear that the court will put the wrong "label" on a tax which they wish to see enacted. Newhouse, Constitutional Uniformity and Equality in State Taxation (Ann Arbor, 1959), at p. 761-2.

It may well be that some courts in the past have been overly eager to characterize newly enacted taxes as "property" or "direct" taxes. Yet, the occasional misapplication of an otherwise useful rule of law hardly furnishes a sound reason for abolishing the rule altogether,—especially when no alternative rule is suggested other than hopelessly vague generalities.

Lake Shore suggests that the traditional distinction as between property and nonproperty taxes reflects a real and meaningful difference. Ad valorem property taxes are truly different from other taxes. Unlike all other forms of taxation, they are imposed on the taxpayer (i.e., the property owner) quite without regard to any action or inaction on his part. The mere fact of ownership,—that and nothing more,—is both necessary and sufficient to establish liability. A corporation does not "own" property any differently than a natural person "owns" property. The State of Illinois cannot deprive a corporation of its property to any greater extent than it can deprive a natural person of his property. In either case, just compensation must be paid. Why then should the State of Illinois be privileged to exact a higher tax on ownership from a corporation than it does from a natural person, where both own identical property, put to the same use? Classification on the basis of ownership is neither rational nor related to the object of the tax. See *Morey* v. *Doud*, 354 U.S. 457, 466 (1957).

At this point it is appropriate to emphasize that the authorities upon which Lake Shore relies are those concerned with property tax classifications based solely upon the corporate characteristics of the property owner.

Lake Shore readily concedes that a less precise test of reasonableness applies where the classification is predicated upon the nature of the property, the use to which it is put, or its location. The distinction was long ago explicitly recognized by Justices Field and Sawyer in the *California Railroad Tax* cases (13 Fed., at 737; 18 Fed., at 408 and 432), and by this Court in *McHenry* v. *Alford*, 168 U.S. 651, 666 (1898). Where the classification is based upon some ground other than mere ownership, this Court

has permitted a very broad range of legislative discretion. See, e.g., *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 191 (1945); *Madden* v. *Kentucky*, 309 U.S. 83 (1940).

A number of the cases relied upon by the State of Illinois in its brief are concerned with property tax classifications not based upon ownership, and hence they have no pertinence to the case now at bar. Among these are *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U.S. 232 (1890); *Carmichael* v. *Southern Coal & Coke Co*, 301 U.S. 495 (1937); *Great Atlantic and Pacific Tea Co.* v. *Grosjean*, 301 U.S. 412 (1937); *New York Rapid Transit Co.* v. *City of New York*, 303 U.S. 573 (1938); and *Tigner* v. *Texas*, 310 U.S. 141 (1940).

Bell's Gap R. Co. v. *Pennsylvania*, 134 U.S. 232 (1890), is an important case because it constitutes the first occasion on which this Court undertook to determine the applicability of the equal protection clause to a state taxing statute. The Court upheld the statute which imposed an ad valorem tax on bonds and other securities issued by corporations at a rate effectively higher than that imposed on other "moneyed securities". That classification, it should be noted, was not based upon the *ownership* of the taxable property, but rather upon supposed differences in the nature of the property itself.

Bell's Gap has been cited with approval in hundreds of subsequent decisions, most frequently for its pronouncement that the equal protection clause does not compel the states to adopt an "iron rule" of equal taxation. The opinion, however, also contains other language which is of even greater relevance to the case now at bar (p. 237):

> "(A state may) if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions, it may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, *so long as they proceed within reasonable limits and general usage,* are within the discretion of the state legislature, or the people of the state in framing their constitution. *But clear and hostile discriminations against particular persons and classes,* especially such as are of an *unusual character, unknown to the practice of our governments,* might be obnoxious to the constitutional prohibition." (emphasis added)

Each of the examples given of permissible classifications and exemptions is based upon the nature of the property itself or the use to which it is put,—not upon ownership.

Of course we cannot know with certainty just what Justice Bradley had in mind when he referred to "hostile discriminations unknown to the practice of our governments." There is however, very good reason to suppose that the Court had in mind classifications based solely upon ownership,—or at least upon corporate ownership. Such classifications were "unknown to the practice of our governments",—both in the United States[14] and in Eng-

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[14] The status of property taxation at the beginning of our nation's history can best be gathered from the apparently complete collection of state constitutional provisions and statutes on that subject contained in the Report to the House of Representatives on Direct Taxation, dated December 13, 1796, prepared by Oliver

land.[13] Furthermore, *Bell's Gap* was argued only four

Wolcott, Jr., Secretary of the Treasury, and published in American State Papers, Finance, Vol. I, p. 414. Examination of these documents reveals no instances of exemption based solely upon the nature of the property owner. Standard texts current around the time of the *Bell's Gap* opinion give no indication that any such practice had developed during the 19th Century, other than the California Constitutional provision invalidated in the *San Mateo* and *Santa Clara* cases. See, e.g., Ely & Finley, Taxation in American States and Cities (N.Y., 1888); Gray, Limitations of the Taxing Power (1906), pp. 656-9.

One apparent exception should be noted. Occasionally a statute will confer an exemption upon the "property of" educational, charitable, religious or governmental institutions. While seemingly based upon mere ownership, the courts have invariably held that the real basis of these exemptions is *use*, inasmuch as the legislature assumed that all property of these institutions would be used for their public or beneficient purposes. See, e.g., *Public Building Comm'n.* v. *Continental Illinois Nat'l. Bank & Trust Co.*, 30 Ill. 2d 115, 122 (1963); *Associated Hospital Service, Inc.* v. *City of Milwaukee*, 109 N.W. 2d 271 (Wisc., 1961); *Annbar Associates* v. *West Side Redevelopment Corp.*, 397 S.W. 2d 635, 652-3 (Mo., 1965).

[13] Prior to the date of the *Bell's Gap* decision there had been two major codifications of English property tax law, embodied, respectively, in the statutes of 1692 (4 Wm. & Mary, Ch. 1), and 1797 (38 Geo. III, Ch. 5). 10 Halsbury's Statutes of England, p. 171 (1929). The coverage of the two statutes was almost identical. Section 3 of the Act of 1797 imposed ad valorem personal property taxes on "all and every person and persons, bodies politick and corporate . . ." Section 4 of that Act imposed real estate taxes on "all and every manors, messuages, lands and tenements . . . as well within ancient demesne and other liberties and privileged places, as without . . . and all and every person or persons, bodies politick and corporate, guilds, mysteries, fraternities and brotherhood, *whether corporate or not corporate* . . . shall be charged with as much equality and indifference as is possible . . ." (emphasis added). Sections 25 and 26 of the Act of 1797 conferred exemptions only upon certain universities, hospitals and almshouses.

The coverage of earlier property tax statutes appears to have been equally broad. See, for example, 1 Wm. & Mary, Ch. 20, §§ 2 and 4 (1688). For the history of the English property tax, see generally, Dowell, History of Taxation and Taxes in England (London, 1888), Vol. 3, pp. 67-123. The principle of universal coverage was established as ea ly as the 12th Century. Mitchell states that "everyone

years after the *California Railroad Tax* cases had been before the Court, and at a time when the issue of corporate power was very much in the public mind. Justice Field was still on the bench, and he concurred in the *Bell's Gap* opinion. With his firmly held and widely known views on the subject of property tax discrimination against corporate ownership, it seems most unlikely that he would have lent his support to any decision which even remotely questioned those views.

In an obvious attempt to create a straw man, the State of Illinois (at p. 16 of its brief) seeks to attribute to Lake Shore a position which is considerably broader than the position Lake Shore has actually adopted in this case. Lake Shore's contention has consistently been that a state may not discriminate against corporate ownership with respect to an ad valorem property tax. In the case at bar, therefore, it is quite unnecessary to determine whether a broader proposition also holds true,—i.e., that for purposes of an ad valorem property tax *no* classification of *any* kind may be predicated upon ownership.

While Lake Shore does believe that the broader proposition is indeed a correct statement of the law, it also recognizes that doubt may have been created by *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1959), even though this Court in that case took some pains to assert that the classification which it approved therein was not in truth based upon mere ownership (358 U.S., at p. 530).

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had to contribute . . . all members of all classes were liable." Mitchell, Taxation in Medieval England (Painter, ed., Yale U. Press, 1951), at p. 116.

In *Allied Stores* this court upheld the validity of an Ohio personal property tax statute which exempted certain categories of property only when owned by nonresidents of Ohio,—thereby seemingly using an ad valorem tax base for the purpose of discriminating *against* resident ownership. While the majority opinion expressly disclaims any intention of overruling *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949), yet, as the concurring justices pointedly observed (p. 530-31), it is not easy to accept the majority's attempted distinction,—namely that in *Allied Stores*, but not in *Glander*, it is possible to conceive of some state policy which might rationally justify the differential even though that policy is not expressed in the statute itself and is not evident from its legislative history.

E. There Is No Rational Basis for the Discriminatory Classification in the Case at Bar.

The State of Illinois purports to read *Allied Stores* as though it overruled not merely *Glander*, but the *Quaker City Cab* case as well. No longer would there be any readily ascertainable rule by which one can distinguish an arbitrary classification from a reasonable one. Instead, it will be sufficient merely to persuade a court that the legislature *might* have had in mind the effectuation of some permissible aspect of public policy, rather than being motivated solely by a malevolent and willful intention to discriminate against one class of taxpayers. By this test, virtually any discriminatory scheme could seemingly pass muster;—except, apparently, the ones stricken down in *Glander*, in *Reserve Life Insurance Co.* v. *Bowers*, 380 U.S. 258 (1965), in *WHYY, Inc.* v. *Borough of Glass-*

boro, 393 U.S. 117 (1968), and except, also, Lake Shore submits, the one involved in the instant case.

Lake Shore does not believe that *Allied Stores* can properly be interpreted in the manner urged by the State of Illinois. But even if construed in a way most unfavorable to Lake Shore, there is simply no plausible means of rationalizing the discriminatory pattern established after adoption of Article IX-A. Each of the ingenious rationalizations offered by the State is squarely refuted by the facts and also by the elaborate statement of legislative intent contained in the Official Argument in favor of Article IX-A (App. A),—a statement which is so detailed that it leaves no room for speculation as to additional unstated motives.

The State advances three separate arguments in support of its position that the discrimination here is reasonable:

1. The personal property tax on corporations is claimed to be in reality a tax on the privilege of doing business in corporate form (State's brief, at p. 15-19). The Explanation and the Official Argument in favor of Article IX-A contain nothing whatsoever from which such an inference can be drawn. Furthermore, as has been demonstrated, the courts have consistently treated property taxes and nonproperty taxes (including franchise and privilege taxes) as being mutually exclusive. This is not to deny that corporations are different from natural persons. Of course they are, and that difference will justify many differential forms of taxation. But the one form of differential it will *not* justify is a differential in ad valorem property taxation.

2. The second rationalization advanced by the State is tied to a suggested concept of "gradualism" (State's

brief at p. 14). A similar argument is apparently sought to be raised in the Petition for Certiorari filed on behalf of the Cook County tax officials in Case No. 71-691. It is said that the abolition of personal property taxation upon individuals is but a step toward the ultimate abolition of all personal property taxation in Illinois, and therefore, presumably, Lake Shore should suffer in silence the denial of its constitutional right to equality because it is, after all, only a temporary deprivation.

Lake Shore is baffled by this argument. So far as it can ascertain, the doctrine of "gradualism" is unknown in American constitutional law. No authority is cited to support it, and presumably none exists.

Moreover, the argument is constructed upon a premise which in all probability is incorrect,—that Article IX, §5(c), of the new Illinois Constitution of 1970 will require total abolition of all personal property taxation by 1979. Although the language of this section does appear, upon superficial examination, to require that result, it is now generally acknowledged among Illinois constitutional authorities that the language chosen by the Constitutional Convention is almost certainly inadequate to accomplish the apparently intended purpose. Indeed, it will probably have the opposite effect of guaranteeing the preservation of personal property taxation in perpetuity.[16]

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[16] One line of argument leading to this conclusion is developed by Kamin, Constitutional Abolition of Ad Valorem Personal Property Taxes: A Looking Glass Book, 60 Ill. Bar Jrnl. 432 (1972). An even more persuasive argument could probably be based upon the impossibility of enforcing (or even understanding) the mandatory replacement requirements of §5(c). In all likelihood, the "requirement" for abolition is not severable from the replacement requirements. The text of §5(c) is reproduced at p. 4 of the State's brief.

3. The final argument advanced by the State in support of its position that the discrimination evolving from Article IX-A is rational involves a contention that the personal property tax is more easily administered with respect to corporations, and that this ease of administration justifies the discriminatory treatment (State's brief at p. 13-14). The ingenuity of this argument is striking, and it deserves an answer.

The personal property tax has been around for a very long time, and almost from the date of its inception it has been subject to both maladministration and public resentment of truly monumental proportions. On this point there appears to have been agreement in every age and in every jurisdiction where the tax has been in effect.[17]

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[17] Seligman, Essays in Taxation (10th ed., 1931) p. 22 et seq. summarizes the vast literature on the evils of personal property taxation. See also Netzer, Economics of the Property Tax (Brookings Inst., 1966), Ch. VI; and authorities cited at fn. 18 infra. Professor Simeon E. Leland, the distinguished authority on state and local taxation, has recently stated that "the personal property tax in Illinois as elsewhere—is a scandal." Memorandum on the Improvement of the Property Tax, in Report of the Governor's Revenue Study Commission 1968-69, at p. 175 (State of Illinois, 1969). His words are reminiscent of those contained in an 1869 Report of the Revenue Commission to the Illinois General Assembly, at p. 8: "debauching to the conscience and subversive of the public morals—a school for perjury, promoted by law."

Adam Smith expressed an additional thought on the problems of personal property taxation:

> "The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person. Where it is otherwise, every person subject to the tax is put more or less in the power of the tax-gatherer, who can either aggravate the tax upon any obnoxious contributor, or extort, by the

So far as Lake Shore can ascertain, however, the State of Illinois (at p. 13 of its brief) is the very first ever to have suggested that the source of these problems lies in the difficulty of locating a particular *class of property owner* (i.e., "individuals"). All other commentators, including the most respected authorities in the field, seem to be in unanimous agreement that the problems of personal property taxation are attributable entirely to the inability or unwillingness of taxing officials to locate and assess certain *classes of property.*[18] This is particularly true of so-called "invisible" property, consisting mainly of intangibles, which comprises the great bulk of property

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terror of such aggravation, some present or perquisite to himself. The uncertainty of taxation encourages the insolence and favours the corruption of an order of men who are naturally unpopular, even when they are neither insolent nor corrupt." (The Wealth of Nations, Book V, Ch. II, Part II (Mod. Lib ed., p. 778).

[18] Netzer, Economics of the Property Tax (Brookings Inst., 1966), Ch. VI; Netzer, "Property Taxes", in International Encyclopedia of the Social Sciences (1968), Vol. 15, p. 548; Property Taxation USA (Lindholm, ed.), Proceedings of a Symposium Sponsored by Committee on Taxation, Resources and Economic Development at the University of Wisc., 1965, esp. at pp. 7, 122; The Property Tax and its Administration (Lynn, ed.), Proceedings of a Symposium Sponsored by Committe on Taxation, Resources and Economic Development at the University of Wisc., 1967, esp. at pp. 15 et seq.; Tax Institute of America, The Property Tax: Problems and Potentials (Princeton, 1967), esp. at pp. 317-366; Buehler, Personal Property Taxation, in Property Tax Symposium (Tax Policy League, 1940), at pp. 128-132; Haig, History of the General Property Tax in Illinois (Univ. of Ill. Studies in the Social Sciences, Vol. 3, 1914) at pp. 144-165; Leland, The Classified Property Tax in the United States (1928), esp. at pp. 401-04; Jensen, Property Taxation in the United States (Chicago, 1931), at pp. 265-80; Ely & Finley, op. cit. fn. 14 supra, at pp. 152-59, 177-82, 192-201.

in a modern industrial society. It also applies, however, to household goods and personal effects which, in the absence of any tradition of effective self-assessment, cannot be located by the assessor without intolerable invasions of personal privacy.[19] The problem is further complicated by the existence of sophisticated and expensive industrial equipment which cannot possibly be appraised by assessors with any tolerable degree of accuracy.

In recognition of these realities, most states long ago undertook at least partial abolition of personal property taxation; and invariably this process has progressed in stages, starting with the most troublesome and least productive classes of property. See, e.g., Advisory Commission on Intergovernmental Relations, The Role of the States in Strengthening the Property Tax (Gov't. Printing Office, 1963), Vol. 1, p. 30-36; Netzer, Economics of the Property Tax (Brookings Inst., 1966), p. 140 et seq.; U.S. Bureau of the Census, Census of Governments 1967, Vol. 2, Taxable Property Values, p. 4-7.

It is quite true that in Illinois (and no doubt in other jurisdictions as well) corporations do pay a disproportionately large share of personal property tax as com-

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[19] In his Report of 1796 (fn. 14 supra), at p. 439, Secretary of the Treasury Wolcott strongly advised against the imposition of a federal ad valorem tax on personalty for the reason that: "... direct taxes on these objects ... are impolitic, unequal and delusive ... They are either arbitrary, or they require an inquisition into the circumstances of individuals, to which free governments are incompetent ..."

Compare Adam Smith's observation (The Wealth of Nations, Mod. Lib. Ed., p. 800): "An inquisition into every man's private circumstances, and an inquisition which, in order to accomodate the tax to them, watched over all the fluctuations of his fortune, would be a source of such continual and endless vexation as no people could support."

pared to natural persons. But no one before has ever suggested that this is because corporations are easier to find than are individuals.[20] The true explanation for this situation, rather obviously, is to be found in two facts: (1) business property tends to be more "visible" than the property (mainly intangibles) owned by natural persons, and most business is conducted in corporate form; and (2) it is less objectionable politically to enforce collection against corporations than against natural persons because only natural persons possess the power to vote the tax collector out of office. (As is noted in the Official Argument (App. "A"), no attempt at all is made to enforce the personal property tax against the three million residents of Chicago who are not engaged in business.)

Where the taxing officials are willing to do so, it is a relatively simple matter to assess a personal property tax upon motor vehicles inasmuch as they are registered with the state, and this is equally true whether the vehicle is owned by a corporation or a natural person. Beyond that, there are two categories of personal property which notoriously bear a highly disproportionate share of the burden: (1) the property of public utilities (which is commonly understood to comprise somewhere between one-half and two thirds of the total personal property tax yield in almost every Illinois county), and (2) farm property. Public utilities, of course, are invari-

[20] Neither the Illinois statute nor the Illinois Supreme Court decision referred to by the State at p. 14 of its brief is concerned with personal property taxes. So far as Lake Shore is aware, there is no reported decision in which an Illinois corporation, or one licensed to do business in the state, has been dissolved or excluded by reason of nonpayment of personal property taxes.

ably operated in corporate form, whereas farms are most commonly owned by natural persons. It is not the form of ownership which determines their vulnerability to the assessor, but rather the relatively high visibility of the assets used in these particular businesses.

Because of the difficulties inherent in the assessment process, and because of the long standing tradition of maladministration, it is undoubtedly true that *all* personal property assessments are essentially arbitrary. The Official Argument sounds this theme with refreshing frankness and in bone-chilling detail. There is not a word in that document which suggests even remotely that the evils of personal property taxation, so vividly described therein, are any less prevalent when the tax is levied exclusively upon corporations. That Official Argument constituted an invitation to the voters of Illinois to lift this burden of evil off of their own shoulders while leaving it astride the shoulders of corporate property owners. Needless to say, that invitation was gratefully accepted.

The State's contention that the personal property tax will be easier to administer if "individuals" are exempted from the tax is further reduced to absurdity if even a moment's thought is given to the new and very substantial administrative problems that would necessarily be created if the State's position were to be sustained by this Court.

First of all, every corporation owning a substantial amount of personal property will endeavor to avoid the tax by transferring title thereto into the name of an individual nominee, or "straw man". No doubt this rather simple-minded device will eventually be foreclosed,—

either through judicial decision, constitutional amendment, or, possibly, administrative regulation. But the need for continuous policing of this avoidance mechanism will certainly require a substantial amount of administrative effort.

When and if the nominee device becomes impractical, corporations will surely work out sale-and-leaseback plans in which the "individual" lessor will have a substantial economic interest in the personal property so that he will have to be recognized as the owner for property tax purposes. The tax saving should be sufficient to provide an excellent financial return to both lessor and lessee.

In addition, every time an item of personal property changes hands to or from corporate ownership a change in its tax status will occur. Keeping track of these will pose a major administrative problem.

The most serious administrative problem stemming from the effectuation of Article IX-A, however, will center around the definition of "individual". For example, are trusts and estates "individuals"? Does it depend on whether the trustee or executor is a corporation? If so, what is the status where there is a corporate co-trustee serving along with one or more individual co-trustees? Or does taxable status depend on whether the ultimate beneficiary of the estate or trust is an individual? And if that is the case, what happens where the beneficial interests are contingent, or where the trust contains discretionary provisions?

A similar set of problems exists for partnerships.

From what has been said, it appears perfectly obvious that large staffs of administrators, and litigators, will be

kept busy for years if the State's position should be upheld. The entire argument of "administrative ease" is a sham, conceived by the State in a desperate effort to find some rational justification for the discrimination created by Article IX-A. It should be brushed aside by this Court just as was the similar rationalization advanced by the State of New Jersey in *WHYY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117, 120 (1968).

II.

THE INVALIDATION OF ARTICLE IX-A OF THE ILLINOIS CONSTITUTION BY THE ILLINOIS SUPREME COURT WAS ERRONEOUS AND IN ITSELF VIOLATIVE OF THE FOURTEENTH AMENDMENT.

A. Preliminary Statement.

The Illinois Supreme Court held that "the discrimination produced" by Article IX-A did violate the equal protection clause, thus sustaining the position urged by Lake Shore and adopted by the trial court. The Supreme Court, however, then concluded that "it is Article IX-A which must fall",—not the personal property taxing provisions of the Revenue Act itself (49 Ill. 2d 137, at p. 151; App. 32). This determination (which reversed Judge Dahl's ruling), had the consequence of leaving the Revenue Act unaffected by Article IX-A, and thereby retained ad valorem personal property taxation on all Illinois taxpayers, individuals and corporations alike. It also had the consequence of wholly frustrating the will of the People of Illinois, who had approved Article IX-A by an overwhelming margin at a referendum held in November, 1970.

The decision necessarily means that neither Lake Shore nor the class of corporations which it seeks to represent

will receive any benefit from Lake Shore's successful challenge to the unconstitutional taxing scheme.[21]

While it can hardly be denied that this "Illinois solution" for the equal protection problem does eliminate the discrimination, it also has other consequences which, Lake Shore suggests, raise serious federal constitutional questions,—questions which are fairly comprised within the issues upon which certiorari was granted in Nos. 71-685 and 71-691.[22]

The decision of the Illinois Supreme Court is incompatible with the fourteenth amendment in at least two respects: (a) Since Article IX-A is a constitutional amendment which neither imposes a tax nor requires a tax to be imposed, it is not the "state action" which is proscribed by the fourteenth amendment,—only the Revenue Act, which actually imposes the tax in a discriminatory manner, is violative of the equal protection man-

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[21] Restoration of the personal property of individuals to the tax base will have only a negligible effect on the tax bills of corporations. See Brief of Lake Shore in Opposition to Appellees' Consolidated Motion to Strike, at p. 2, fn. 2.

[22] A question substantially the same as that raised here was sought to be raised by Lake Shore in its Jurisdictional Statement filed in connection with its appeal to this Court from the Illinois Supreme Court (No. 71-674). That appeal was dismissed for "want of jurisdiction" on April 3, 1972. It is Lake Shore's understanding that dismissal for want of jurisdiction does not constitute a decision on the merits, and that the order merely signifies this Court's belief that the constitutionality of the Revenue Act itself was not deemed by the State Supreme Court to be in issue so as to confer appellate jurisdiction under 28 U.S.C. §1257(2). See *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 651 (1942). Hence Lake Shore analogizes its present position to that of a Respondent who had made no initial attempt to seek review of the lower court decision.

date; and (b) by depriving corporations of the economic benefit to be gained from asserting and vindicating their equal protection rights, such rights have been impermissibly impaired or "chilled".

B. Article IX-A Does Not Offend The Equal Protection Clause.

Article IX-A states merely that "notwithstanding any other provision of this constitution, the taxation of personal property by valuation is prohibited *as to individuals.*" (emphasis in original). In no sense is this prohibition in constitutional conflict with any other provision of the Illinois Constitution of 1870. That Constitution, as it existed prior to the adoption of Article IX-A, did not mandate the imposition of personal property taxes on *any* class of taxpayer. It simply required (Article IX, §§1 and 9) that any property taxes which the General Assembly might choose to levy or authorize must be imposed uniformly so that "every person and corporation shall pay a tax in proportion to the value of his, her or its property." (The full text of Article IX, §1, of the Illinois Constitution of 1870 is set out at p. 3 of the State's brief).

If viewed separate and apart from Section 18 of the Revenue Act itself (which directs that *all* real and personal property in the state be taxed), the constitutional pattern presented by the interaction of Articles IX and IX-A is innocuous. It might well be paraphrased as follows:

> "If any tax shall be imposed on property, that tax shall be levied uniformly so that every person and corporation shall pay a tax in proportion to the value

of his property, except that the personal property of individuals shall not be taxed."

Consistent with this pattern, and with the equal protection clause, the legislature would be free to impose property taxes only on real estate. In other words, Article IX-A, standing alone, in no way violates the equal protection requirement. It neither imposes any tax, nor does it compel any unlawful discrimination.[23] That Article does not even constitute state action,—let alone state action which denies the equal protection of the laws to any person.

The instrument by which the unlawful discrimination is practiced is §18 of the Revenue Act. That statute, and that statute alone, imposes a tax. While it still nominally purports to tax *all* personal property, the necessary effect of the adoption of Article IX-A was to preclude the imposition of the tax on the personal property of individuals. Accordingly, the statute now imposes a tax only on the personal property of non-individuals.—a form of discrimination prohibited by the equal protection clause.

The "Illinois solution" of invalidating Article IX-A is more than merely unique. The striking down of the constitutional provision, rather than the Revenue Act, is contrary to the commonly accepted understanding that a constitution is to be accorded higher status than a mere

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[23] For this reason, the case at bar is readily distinguishable from cases such as *Frost* v. *Corporation Commission*, 278 U.S. 515, 525-6 (1929), and *Truax* v. *Corrigan*, 257 U.S. 312, 341-2 (1921), wherein the amendatory law, read in conjunction with the law previously in effect, necessarily created an invalid classification thereby causing the amendment to be invalidated.

statute. See *Reynolds* v. *Sims*, 377 U.S. 533, 584 (1964), where this Court said:

> "State constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated."

Moreover, the Illinois Supreme Court made not even a pretense of attempting to ascertain the intention of either the People or the legislature,—i.e., whether, had they been aware of the unconstitutionality of the discrimination, they would have chosen to remove the tax from all classes of taxpayers, or whether they would have chosen instead to forego Article IX-A in its entirety.[24]

Interestingly enough, the Illinois Supreme Court did not treat the issue as one of the severability of Article IX-A, either with respect to the remainder of the constitution itself, or with respect to the Revenue Act. Upon reflection, however, it becomes apparent that severability could not be employed in that court's analysis because the "amendment" was at the state constitutional level while the law purportedly affected was of inferior stature,—i.e., a mere statute. This being so, the "standard" approach used in determining whether an amendment alone falls, or whether the entire law as amended is to be invalidated (exemplified by the *Frost* and *Truax* cases, cited at fn. 23 supra), would be inappropriate.

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[24] The trial judge in the *Lake Shore* case had stated (Rec. 46): "There is no question in the minds of anybody that the People of Illinois would have overwhelmingly passed it (Art. IX-A) without the words 'as to individuals' . . . If the words 'as to individuals' were left out, and the People voted on the question of abolition of all personal property taxes, the vote would have been overwhelming."

The only "reason" given by the Illinois Supreme Court for its holding is in truth no reason at all, but merely a statement devoid of any meaning other than as a restatement of its conclusion:

> "We hold, therefore, that the discrimination produced by Article IX-A violates the equal protection clause of the fourteenth amendment. *Apart from that discrimination, the validity of the Revenue Act is not challenged and we hold that it is Article IX-A which must fall.*" (emphasis added)

Under these circumstances, the only plausible inference which can be drawn is that the Illinois Supreme Court invalidated Article IX-A simply because it thought, erroneously, that such a result was required by the equal protection clause. Even if it be assumed that the form of relief from an equal protection violation is a question of state law, this Court has held that an interpretation of state law by a state court acting under compulsion of federal law erroneously understood is not controlling in federal courts. *Tipton* v. *A.T. & S.F. Ry. Co.*, 298 U.S. 141, 151 (1936); *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 120 (1924). Cf. *State Tax Comm'n. of Utah* v. *Van Cott*, 306 U.S. 511, 514 (1939).

There is nothing in the opinion of the Illinois Supreme Court which offers the slightest clue as to the reasoning by which that court reached its conclusion that Article IX-A (rather than the Revenue Act itself) was violative of the equal protection clause. Even though that determination might ordinarily be deemed a matter of state law controlling upon this Court (cf. *Morey* v. *Doud*, 354 U.S. 457, 469-70 (1957), wherein this Court honored the Illinois Supreme Court's *express finding* as to legislative intent), Lake Shore submits that such controlling effect

ought not be accorded a state court determination which is based upon no reason at all, and is nothing more than an ultramontane pronouncement. Hence, this Court should be free to make its own determination of what the state law is. *Guinn* v. *United States*, 238 U.S. 347, 366 (1915).

Finally, the "Illinois solution" only superficially grants equality of treatment to corporations. In 1970, for example, Cook County corporations paid $126,000,000 in personal property taxes, whereas all other taxpayers in the county paid only $15,000,000. (These figures, while apparently unofficial, are set forth in the Amended Petition for Writ of Certiorari filed in No. 71-685 by the Attorney General of Illinois, at page A49).

In reality, therefore, by voiding Article IX-A and thus salvaging the personal property tax, the Illinois Supreme Court simply preserved the *status quo ante*, and erroneously sought to cure an equal protection violation by the prohibited measure of the "reimposition of inequalities". *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948).

C. Enforcement Of Rights Protected By The Equal Protection Clause Will Be Seriously Impaired If The Holding Of The Illinois Supreme Court With Respect To The Invalidity Of Article IX-A Is Allowed To Stand.

If constitutionally guaranteed rights are to be honored only in form and not in substance the right supposedly guaranteed will soon disappear. In this case the affected class happens to consist of corporations, but if countenanced here the application of the "Illinois solution" to equal protection problems of other groups will not be long in coming.

In *Harman* v. *Forssenius*, 380 U.S. 528, 540 (1965), this Court said:

> "It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . . . 'Constitutional rights would be of little value if they could be * * * indirectly denied,' . . . or 'manipulated out of existence.'"

Lake Shore, of course, recognizes that *Harman* was concerned with the right to vote. Voting rights, along with the first amendment rights of free expression and the fourteenth amendment rights of freedom from racial discrimination, are certainly among those "sensitive and fundamental personal rights" which will be subjected to "stricter scrutiny" by this Court. (*Weber* v. *Aetna Casualty & Surety Co.*, ... U.S. ....., 92 S. Ct. 1400, 1405 (1972)). Where such personal rights are at stake this Court has been keenly alert to the danger that their assertion may be discouraged, or "chilled", by various forms of state action: *Dombrowski* v. *Pfister*, 380 U.S. 479, 487, 494 (1965); *Shelton* v. *Tucker*, 364 U.S. 479, 487-8 (1960); *Smith* v. *People*, 361 U.S. 147, 155-6 (1959); *Time, Inc.* v. *Hill*, 385 U.S. 374, 401-2 (1967) (concurrent opinion); *Shapiro* v. *Thompson*, 394 U.S. 618, 631 (1969).

While fully acknowledging the priority rightfully accorded to such sensitive and fundamental personal rights, Lake Shore respectfully suggests that the effective protection of constitutionally guaranteed rights of property has also been a traditional concern of this Court.

It is perhaps not without significance that one of the authorities relied upon in *Harman* v. *Forssenius* was *Frost & Frost Trucking Co.* v. *Railroad Comm'n of*

California, 271 U.S. 583 (1926). That case involved only a property right, and in it this Court struck down a California statute which purported to deny to private motor carriers the privilege of using the state's highways unless the carrier consented to regulation as a common carrier. Under prior decisions, the fourteenth amendment had been construed so as to prohibit a state from directly compelling a private carrier to assume common carrier status.

This Court said (271 U.S., at p. 593):

> ". . . constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which though in form voluntary, in fact lacks none of the elements of compulsion . . . In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden."

Of much the same import are cases such as *Ex parte Young*, 209 U.S. 123, 147-9 (1908) and *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331, 336-7 (1920), wherein this Court has consistently stricken down attempts by states to discourage constitutional challenges to their actions by prescribing such heavy penalties for violation that no citizen can afford the gamble of noncompliance in order to lay the necessary groundwork for a challenge.

In the instant case, of course, Lake Shore, hopefully, is not threatened either with prohibitive fines or loss of its livelihood as the price for an unsuccessful challenge to the discrimination practiced against it. Nevertheless,

the solution sanctioned by the Illinois Supreme Court is every bit as effective, if not more so, in discouraging citizens from asserting their constitutionally guaranteed rights. For even if Lake Shore and those challengers who come after it prevail in their arguments that the discrimination practiced is unconstitutional, they will have gained nothing for their efforts. It would be hard to imagine a system that could more surely stifle any inclination to enforce the constitution through private litigation.

At least where property rights are concerned, enforcement of the fourteenth amendment depends largely upon litigation brought by citizens who believe themselves aggrieved by state action. On rare occasions, perhaps, a taxpayer may challenge a discriminatory tax out of a sense of social responsibility. Human nature being what it is, however, the only incentive that normally will be adequate to insure a challenge to an unconstitutional tax and to warrant the incurring of the attendant litigation expenses is the possibility that the plaintiff will ultimately succeed in ridding himself of the tax burden.

The "Illinois solution" of fulfilling equal protection guarantees by reimposing the tax on all, if it is allowed to stand, will inevitably have the consequence of severely impairing the only real incentive taxpayers have to challenge unconstitutionally discriminatory action by state legislatures.

No doubt any equal protection violation could be "cured" equally as well by imposing the burden on the favored class, rather than removing it from the disfavored class. Still, the cure employed by the Illinois Court appears to be virtually unique.

That the courts have consistently seen fit to avoid th remedy adopted here,—despite its obvious availabilit strongly suggests that the judiciary has been well awa of its inherent chilling effect.

There are literally hundreds of reported decisions i which the courts have been required to deal with a co tention that a particular taxing statute was inconsiste with the equal protection mandate, and in a fair propo tion of those cases the challenge has been sustained. Y it is nearly impossible to locate a case in which the su cessful challenger has found himself in the untenab predicament which now confronts Lake Shore,—i.e., t have successfully asserted the infringement of its const tutional rights, but not to obtain the benefits of th victory.

III.

THE CLASS ACTION FINDING IN SHAPIRO v. BARRE IS VOID FOR WANT OF DUE PROCESS OF LAW, AND T ADVERSE JUDGMENT THEREIN HAS NO RES JUDICA EFFECT WITH RESPECT TO LAKE SHORE AUTO PAR CO. OR ANY OTHER ILLINOIS CORPORATION EXCEPT WEIL & SONS, INC.

The case of *Shapiro* v. *Barrett* (No. 71-691) was fil in the Circuit Court of Cook County while *Lake Sho Auto Parts Co.* v. *Korzen* (No. 71-685) was pending b fore the Illinois Supreme Court. The four plaintiffs the *Shapiro* case each claimed to represent a separa class of personal property taxpayers,—corporations, pa nerships, sole proprietorships, and natural persons n engaged in business. Lake Shore, of course, was not party to that case.

Hardly any pretense was even made that *Shapiro* v. *Barrett* was an adversary proceeding. Its preordained nature is demonstrated by many things, both within and without the record. Not the least of these is the fact that the forms of relief nominally sought by the various co-plaintiffs were mutually antagonistic to one another (See the complaint, at Rec. 265, 273-5). Notwithstanding this incompatibility of interest, the four plaintiffs joined in the filing of a single complaint and filed a joint brief in the Illinois Supreme Court. (That complaint and brief are attached as exhibits to a document filed with this Court by Lake Shore on May 17, 1972, and designated "Reply of Lake Shore Auto Parts Co. to Response of M. Weil & Sons, Inc., to Motion of *Maynard* Respondents For an Order Recognizing Them as Parties to the Appeal.")

The nonadversary nature of *Shapiro* v. *Barrett* is further demonstrated by the lightening-like speed with which the case moved to final judgment in the circuit court. Only twenty days elapsed between the filing of the complaint and the entry of the final decree. The "hearings" in the case consisted of two sessions at which counsel for the various participants orated at length on wholly irrelevant matters. Shortly after the entry of the decree a notice of appeal was filed and a single justice of the Illinois Supreme Court, in vacation, entered an order consolidating the case for hearing with *Lake Shore Auto Parts Co.* v. *Korzen.*

The original purpose of *Shapiro* v. *Barrett,* apparently, was to obtain from a trial judge assigned to the tax division of the circuit court (not the chancery judge who had heard the *Lake Shore* case) a decree holding that

Article IX-A should be construed so as to exempt from ad valorem personal property taxation only the property of natural persons "used for the personal enjoyment of themselves and their families." Evidently the participants felt that a trial court ruling to that effect might persuade the state supreme court to adopt that interpretation,—thereby eliminating the equal protection problem and permitting the continued taxation of corporations.

The Illinois Supreme Court, of course, rejected this argument and directed dismissal of the complaint in *Shapiro* v. *Barrett*. That court, also, in its discussion of the *Shapiro* action, seems to have recognized the questionable nature of that case when it stated (49 Ill. 2d 137, at p. 145; App. 25):

> "That it is not necessary that each person or group of persons favorably or unfavorably affected by a legislative classification be made parties to an action challenging the validity of that classification is apparent . . . Additional class actions were not necessary to place before the court all pertinent legal theories."

In view of the court's disposition of *Shapiro*, however, it presumably felt that any further action or comment on its part was unnecessary.

If this were all that were involved in *Shapiro* v. *Barrett*, Lake Shore would have no particular concern about that case. A problem is presented, however, by the trial court's finding in *Shapiro* (App. 16) that:

> "2. Each of these plaintiffs has standing to bring this action in his or its own behalf and is a proper representative of his class.
>
> "3. That this action is properly maintained as a class action, and the members of those classes are

adequately and competently represented by counsel herein."

Lake Shore, of course, is a member of the class of corporations claimed to be represented ("adequately and competently") by M. Weil & Sons, Inc., one of the plaintiffs in *Shapiro* v. *Barrett*. (*Lake Shore* v. *Korzen* was also brought as a class action, but the trial judge in that case deferred a ruling on the class action question. App. 6).

If the class action findings in *Shapiro* v. *Barrett* are valid, then the order of the trial court dismissing the complaint as to M. Weil & Sons, Inc. (which order was affirmed by the Illinois Supreme Court and further review not sought by any plaintiff) would necessarily have *res judicata* effect as to Lake Shore so as to bar Lake Shore from further arguing, in this Court or elsewhere, the merits of the basic constitutional issue discussed in Point I of this brief,—to say nothing of Lake Shore's right to assert its own claim to represent the class in any subsequent proceedings below.

This result would follow from the fact that the complaint in *Shapiro* v. *Barrett* (Rec. 265), while bordering on incoherency, may be construed to set forth a cause of action at least as broad as that set out in Lake Shore's complaint. The motion to dismiss the complaint in *Shapiro*, filed by the Cook County taxing officials (Rec. 291), contends that the complaint fails to state a cause of action. That motion was sustained by the trial court, and this ruling was affirmed on appeal.

Dismissal of a complaint for failure to state a cause of action constitutes a ruling on the merits, and is *res judi-*

cata as to all issues encompassed therein: *Elston-Dawes Currency Exchange, Inc.* v. *Sheon*, 46 Ill. App. 2d 218, 223 (1964); *Vanlandingham* v. *Ryan*, 17 Ill. 25, 30 (1855).

By reason of the foregoing, it behooves Lake Shore to establish that the purported class action findings in *Shapiro* v. *Barrett* are void and of no effect whatsoever. This is particularly so inasmuch as M. Weil & Sons, Inc. has repeatedly asserted in this Court that it represents a class consisting of all Illinois corporations, and that it "has been declared by Illinois' courts properly to have maintained its action not only as an individual corporation, but as a representative of every corporation in the State of Illinois, and that each member of this class of corporate entities is adequately and competently represented herein."[25] This assertion is remarkable under the circumstances (i.e., the dismissal of Weil's complaint), and especially so in light of the Illinois Supreme Court's statement (App. 25) that "additional class actions were not necessary".

In other words, M. Weil & Sons, Inc. proclaims and insists that the entire class which it purports to represent ("adequately and competently") is bound by the adverse judgment rendered against Weil in the trial court, affirmed on appeal to the Illinois Supreme Court, and review of which was not sought in this Court by Weil.

This Court may be puzzled as to why a party purporting to adequately and competently represent a class of

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[25] Brief of M. Weil & Sons, Inc., at p. 2. See also the Response of M. Weil & Sons, Inc. to Motion of *Maynard* Respondents for an Order Recognizing Them as Parties to the Appeal, at p. 5 (filed May 12, 1972).

plaintiffs would want to insist that this class should be bound by an adverse judgment. That question is no more puzzling, however, than the question of why M. Weil & Sons, Inc. should contend that Article IX-A is unconstitutional and void,—a result which yields no benefit to the class which Weil purports to represent. (Brief of M. Weil & Sons, Inc., at pp. 3 and 6-9).

The class action findings in *Shapiro* v. *Barrett* were unsupported by any evidence whatsoever, were made without any hearing or notice to any party, let alone to absent class members, and the transcript of the "argument" before the trial court reveals no mention at all of the class action issue. The findings were simply inserted in the proposed decree by the parties and presented to the judge for signature. Under these circumstances, the adverse judgment of the court clearly cannot, consistent with the requirements of due process of law, be binding in any way upon absent class members. *Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555, 564-5 (2d Cir., 1968). Cf. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

CONCLUSION.

For the reasons set forth herein, Lake Shore Auto Parts Co., Respondent in No. 71-685, respectfully asks that this Court affirm the judgment of the Illinois Supreme Court insofar as that court held unconstitutional the discriminatory taxing pattern established in Illinois following the adoption of Article IX-A as an amend-

ment to the Illinois Constitution of 1870; that the judgment below be reversed insofar as it declared Article IX-A to be unconstitutional and void by reason of the equal protection clause of the fourteenth amendment; that this Court declare the Revenue Act of Illinois to be unconstitutional and void insofar and to the extent that it purports to impose ad valorem personal property taxes only upon the property of corporations and other non-individuals while at the same time exonerating from tax the property of individuals; and that this Court vacate and hold for naught the purported findings, in *Shapiro* v. *Barrett*, that the plaintiffs therein adequately and competently represent the classes of taxpayers which they claim to represent.

Respectfully submitted,

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APPENDIX A

Explanation of Amendment

The amendment would abolish the personal property tax by valuation levied agaiqnst individuals. It would not effect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870. Article IX-A, thus setting aside existing provisions in Article IX, section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations.

Arguments in Favor of the Proposed Amendment

The purpose of the proposed addition of Article IX-A to the Constitution is to abolish the unfair and unworkable taxation of personal property of individuals throughout Illinois.

The present taxation of personal property of individuals is unfair because:

—It is not evenly administered, and cannot be. Variations in assessment practices from one assessing district to another are extreme, and result in unfair treatment of some taxpayers while others virtually escape any taxation of this kind. Individuals comprising about a third of the population of the State pay no personal property taxes whatever, while the rest pay taxes on their automobiles, on their household furniture, in some cases on their bank accounts and other financial resources, and, in

rural areas, on their livestock, grain, farm implements, etc.

—The taxation of personal property is a relic of the 19th century, when agriculture was the predominant occupation in the State, when a man's worth and ability to pay could be measured by his material possessions, when intangible assets were not at all common, and when personal property could not be easily hidden from assessors. Things are different today. Intangible assets are common, but not easily assessed and taxed. Thus, personal property taxation is now made, for the most part, of necessities of modern life such as family automobiles and a family's furniture.

—Personal property taxation encourages cheating and evasion. Virtually every property taxpayer in the State perjures himself every year because he does not report all of his personal property to the assessor. This built-in feature of personal property taxation cannot do otherwise than to aid and abet the disintegration of the moral values of our society which we have cherished for so long and which we see slipping away day by day.

If adopted by the People of Illinois, this amendment to our Constitution will:

—Remove the necessity of cheating on taxes, remove the impossible demands now placed on assessors to achieve fair taxation, and, above all, remove an onerous and universally despised tax program.

—Modernize the revenue provisions of our Constitution, an objective of which the People of Illinois have indicated they are heartily in favor.

The abolition of personal property taxation should be accomplished by constitutional reform. It should not be left to statutory action, which cannot be permanent in nature and which most certainly would lead to continuous court action and indecision as to exactly what was intended.

Even the placing of this question on the ballot for the People to consider has been a powerful indication to Illinois' constitutional convention delegates that the People prefer to end this unfair kind of taxation. At the time these arguments in favor of amending the Constitution were prepared, it could not be known what the constitutional convention's final decision on personal property taxation would be. But adoption of this amendment will indicate, once and for all time, that the People are fed up with unfair taxation.

The loss of revenue to local governments in Illinois if personal property taxation of individuals is abolished will be considerable, to be sure. But modernization of our entire tax system will make possible replacement of this needed revenue through other, fairer, sources.

In short, there is no compelling argument which can now be raised against adoption of this amendment. And there is every reason to support it.
